No. 1214

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHWESTERN STEAMSHIP COMPANY, a corporation,
Plaintiff in Error,
vs.
V. V. GRIGGS,
Defendant in Error.

No. 1214

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, SECOND DIVISION

Reply Brief of Plaintiff in Error

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REPLY BRIEF OF PLAINTIFF IN ERROR

The brief of counsel for defendant in error admits the principle of law contended for by plaintiff in error, cites no authorities, and is mainly an attempt to excite prejudice against plaintiff in error by accusing its counsel of an attempt to distort the facts and to conceal evidence. The only reply which we have to make to this position is to ask this Court to consider carefully the record and the brief which we have heretofore filed. An examination of the record will show that we have cited impartially in our brief the testimony of defendant in

error bearing upon the question of his assumption of risk. Nothing more was intended in citing that portion, as will appear from the whole brief. An examination of the record will also show that the chief danger complained of was because of the absence of the guard or rail. Defendant in error says that his employer, Mr. Cox, realized that it was dangerous when he went up there and saw it the first time (Record p. 44). He also states (Record p. 43) that Mr. Cox wanted a rail or guard fixed to keep from falling off there; that he thought it was dangerous because a person might fall over. A careful examination of his testimony will show that defendant in error considered the place dangerous because there was no guard or rail, and it is evident from the record that the proximate cause of the injury was the falling of defendant in error from the place where he stood, and not the absence of the netting, which contributed to his injury, but which certainly was not its cause. However, it matters little whether the absence of the guard was the cause of the injury, or the absence of the netting. The fact remains that defendant in error understood and appreciated the risk and the danger, from whatever cause, and that he therefore assumed the risk by voluntarily encountering it. He says: "Every time I went upon that space I knew it was dangerous" (Record p. 43). Whether he knew this danger to be occasioned by the absence of the guard or by the absence of the netting, he assumed

the risk in either case; and if he always realized the danger, and Mr. Cox, his employer, realized it, it is evident that the danger as it appeared to him and Mr. Cox was caused by the absence of the guard. for, if the contention of defendant in error is correct, they could not have thought it dangerous when the netting was in place. If he considered it dangerous because the netting was liable to be removed for various reasons, then it was at least his duty, knowing and appreciating the danger as he testifies that he did, to satisfy himself before going upon the walk that the netting was in place. Counsel for defendant in error states that he assumed that the netting was in place. He had no right to assume this. He knew that this hatchway was often in use, and in this particular instance he knew that the netting had been removed but a short time before, and he should therefore have seen that the netting was in place before going upon the walk to feed the sheep. We say that it was his duty to do this, because he has shown by his testimony that he thoroughly understood and appreciated the danger, and that he still continued to encounter it, and therefore he assumed the risk or was guilty of contributory negligence in acting as he did. In this connection we call the Court's attention particularly to the following statement of Griggs (Record p. 51):

> "I suppose it would be perfectly natural for a person coming from the hatch in the main deck, knowing that the position was a dangerous one, to look and see if the hatch was protected, and that I would have done so if I had not been looking at them raising this horse."

The defendant in error, as an onlooker purely, became interested in this proceeding, and then went into the dangerous place without any precaution, and thus by his own mouth directly confesses his own negligence, notwithstanding any different or qualifying statements may be made elsewhere.

Counsel for defendant in error states on page 10 of his brief that:

"The hatchway was not in use at the time defendant in error went upon the false deck, and except by very close observation it could not be discovered that the usual means of protection had been omitted. Thus the injury came to the defendant without his negligence."

An examination of the testimony of defendant in error, however, shows that he did not know whether the hatch was covered or not, and did not look to see (Record p. 51). He says:

"I never noticed whether this netting was partly off the hatch when I went up there from the main deck. I never looked to see."

Counsel for defendant in error on pages 8 and 9 of his brief states:

"The defendant in error had observed this netting stretched across the hatchway at different times, and at first—for the first day or two of his feeding the sheep—he always looked for the netting when he went up to the walk to feed the sheep, because he knew that the place was dangerous if the netting were not there; but he always found the netting there, and becoming accustomed to expect it there, he ceased to be so careful in watching for it every time he went up to feed the sheep."

The testimony of defendant in error (Record p. 45) is as follows:

"I would be able to see if I was close to the hatch whether or not it was in use, and when on this space feeding these sheep, I have quite a number of times looked down and seen the netting. I did this all the time when I first started out, for the reason that I saw a number of days when it was off. I was afraid of its being off and I would slip over through it."

Defendant in error knew that the netting was always off when the hatch was in use, and he had no right to assume that the netting would be in place when he fed the sheep.

Counsel for defendant in error, on page 9 of his brief, also states:

"Knowing that the netting was put there to prevent persons from falling through the hatchway, and observing that it was kept in place regularly when not removed for the temporary purpose of using the hatchway in passing objects to and from the hold, defendant in error had a right to suppose that it was in place when he went up there on the occasion particularly involved in this action."

We are unable to see why the defendant in error had a right to suppose that the netting was in place or to suppose that the hatchway was not in use. He had no right to suppose any such thing, for he knew that the hatchway was frequently in use, and had seen it in use only a few minutes before the injury.

The proximate cause of the injury, however, was not the absence of the netting, but the absence of the guard,

and a cursory reading of the record is enough to disclose the fact that this was the negligence complained of, and that defendant in error and his employer appreciated and understood this risk. If the hatchway had been in use at the time defendant in error fell, certainly it could not be said that the absence of the netting constituted negligence on the part of the plaintiff in error, yet the injury would have been the same as in this instance. The proximate cause of the injury was not the absence of the netting, but the absence of the guard. The whole argument of the defense is but an ingenious attempt to get away from the principle of "*Volenti non fit injuria*," which he concedes on page 10 of his brief to be the law. No matter how the plaintiff in the court below was injured, the fact remains that by his own testimony he has shown that he thoroughly understood and appreciated the risk and that he voluntarily encountered it.

Answering the argument under the second assignment of error, page 11 of the brief of defendant in error, we desire only to refer this Court to the record, pages 66 and 67.

Counsel for defendant in error, on page 14 of his brief, apparently for want of any other argument, attempts to show that counsel for plaintiff in error has sought to mislead this Court by repeating only a portion of the instruction complained of. An examination of the

brief of plaintiff in error will show that the instruction complained of is set out in full in the assignment of errors, and referred to in the argument by the page in the record, and we did not in writing that brief imagine for one moment that this Court would only take into consideration the one phrase of the instruction which, for brevity, was quoted in the argument when the full text was set out on a former page. We contend that the giving of that instruction was error, for it certainly gave the jury a wrong impression as to the degree of care required on the part of the carrier. The superlative expression, "The highest degree of care that human judgment and foresight can conceive," cannot be qualified or modified by the addition of a clause "that is practicable in view of the circumstances." The giving of this instruction was error; and the instructions as a whole emphasize the law in regard to the liability of the carrier, and state the law regarding the duty of the passenger so broadly and generally and without application to the facts in the case, and with so little force, as to leave no impression upon the mind of the jury that the defendant in error should have been without contributory negligence in order to recover.

Counsel ingeniously contended that an erroneous instruction might be given, and if afterwards another instruction was given which would be separate and apart, and yet stated the law correctly, that that would cure the former instruction which stood also before the jury.

No authority was cited, nor do we know of any that will sustain this view or contention. An erroneous instruction may be given, and upon consideration withdrawn, and then the defect is cured, but where two instructions are placed before the jury, and one is the law and the other is not, no one is able to determine which one of the instructions was the guide by which the jury reached the verdict.

Defendant in error, on page 15 of his brief, states that the fifth assignment of error is the instruction marked 14 on page 114 of the record. The instruction complained of, as will be seen by the brief of plaintiff in error (p. 8) is the one found on page 115 of the record and numbered 15. The argument of counsel therefore upon this error is not in point.

On the 17th and 18th pages of his brief counsel for defendant in error says:

"The Court was asked to give them (instructions)—according to the record—in a lump—all or none—and the exception is to the refusal to give all."

Let us examine the record before accepting this statement. On page 102 we find:

"The defendant requested the Court to give the following instructions, to-wit:"

On page 104, at the first part of the paragraph, we find:

"Which said requests for instructions the Court refused to give the same, etc."

Note the plural of request. Had the request been made as a lump, then the word would be in the singular, but here is the clear intimation that the requests were made singly and as such excepted to. However, we turn to Carter's Code of Alaska and Sec. 222 states:

"No particular form of exception shall be required. The objection shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more."

We ask therefore if there is not sufficient in this record to show a full compliance with the Alaska Code?

Respectfully submitted,

JOHN P. HARTMAN,
Attorney for Plaintiff in Error.